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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-452

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,

—against—

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

MOBIL ALASKA PIPELINE COMPANY'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Mobil Alaska Pipeline Company, respectfully submits this brief in reply to the Brief for the Federal Parties in Opposition ("Fed. Br.") and the Brief in Opposition for Respondents, the State of Alaska and Arctic Slope Regional Corporation ("Alaska Br.").

QUESTION PRESENTED

The broad question presented is whether section 15(7) of the Interstate Commerce Act confers upon the agency which administers that act unreviewable, discretionary power either to forbid the operation of a newly constructed pipeline for a seven-month "suspension" period or to dictate the rates, terms and conditions under which such a pipeline may be operated during such period. The petition for writ

of certiorari argued that the legislative plan imposed limitations upon the authority of the regulatory agency.[1]

ARGUMENT IN REPLY

Respondents do not deny that, if the regulatory agency possesses the arbitrary power which it asserts, then it may inflict irrecoverable loss on new carriers without opportunity for fair hearing or judicial review. Respondents contend that the summary exercise of such power may give the public the immediate benefits of reduced rates on new pipelines (Fed. Br. 7; Alaska Br. 10), but they ignore the question whether the existence of such power might in fact deter construction of needed pipelines.[2]

Respondents' principal argument appears to be that the literal terms of section 15(7) authorize suspension of any tariff containing a "new rate," and that a new carrier's original rate is "new"; that Congress has given the agency absolute discretion whether to suspend; and that if the agency has discretionary power to suspend a rate it must

1. Petitioner contends (1) that Congress did not intend to authorize suspension of a carrier's original tariff (Pet. 17-21), (2) that suspension of a tariff is lawful only upon a finding that preservation of the status quo is preferable, in the public interest, to commencement of service at the new rate (Pet. 22), and (3) that suspension may not be used to compel adoption of rates fixed by the regulatory agency without fair hearing or opportunity for judicial review (Pet. 25).

2. For a forecast of the future need for pipelines, *see generally* U.S. DEPARTMENT OF TRANSPORATION, NATIONAL TRANSPORTATION TRENDS & CHOICES (TO THE YEAR 2000) at 289-302 (advance printing 1977).

Although some of the loss which petitioner incurred as a result of the Commission's action was recouped by petitioner's parent, a shipper of oil on the pipeline, the parent produces only about 2% of North Slope oil, while petitioner owns 5% of the pipeline capacity. In consequence some 60% of the oil transported by petitioner is produced by unrelated parties. *See* Pet. 5 n. 3. Accordingly, petitioner's losses are real and substantial. In contrast, due to pricing and market structure in the oil industry, consumers gained no benefit from the ICC's imposition of lower rates in the instant case. *See* Pet. 7. Respondents have not disputed this point. *See* Pet. App. A-17.

also have power to decree in advance what rates it will and will not suspend, even though the statute authorizes it to make rates only after full hearing. Respondents' chain of reasoning disregards the purpose and intention of Congress.

1. Congress Did Not Authorize Suspension of a New Carrier's Original Tariff.

The reason Congress authorized suspension of "new rates" was to ensure that service would continue to be available at the old rates, that the status quo of transportation would be preserved during an investigation. Congress deemed it consistent with due process to require the carrier to postpone a change in rates which it had previously established for itself.[3] Congress contemplated suspension only where the carrier could continue its prior rates and services, not where the result would be total blockage of service by a new railroad or pipeline. *See* Pet. 15-16.

Respondents seek to suggest both that it is well established by prior agency practice that an original rate may be suspended and that the question has never arisen before and is unimportant. *Compare* Fed. Br. 6 and 8. The question appears to have arisen at least twice before, and on those occasions the Interstate Commerce Commission rejected suspension of a carrier's only tariff as inherently unfair (*In re Wharfage Charges of the Galveston Wharf Co.*, 23 I.C.C. 535, 537 (1912)) or held that it was "without jurisdiction" to order suspension, *Restriction in Routing Between Greenwood and Augusta*, 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line Railroad* v. *United States*, 48 F.2d 239, 245 (W.D.S.C. 1931), *aff'd*, 284 U.S. 288 (1932). The case upon which respondents rely as evidence of a contrary practice, *Rail-Water, Grain in Bulk, Missouri, Illinois*

3. *See, e.g.*, 45 CONG. REC. 6504 (1910) ("the railroad having once established a rate, it must be accepted as at least high enough not to confiscate its property . . . .") (remarks of Sen. Bailey); *id.* 6509 (Sen. Crawford); *id.* 6510-11 (Sen. Cummins); *id.* 5845 (Rep. Madden, quoting Commissioner Clements).

and Indiana to Buffalo, 321 I.C.C. 564, 566 (1963) (Fed. Br. 6, Alaska Br. 5), did not concern a new carrier's original rate, but rather the decision of an established carrier by water to file a new joint rate, in collaboration with a railroad, which would permit through shipments of grain by rail and water. There was no question but that the Commission could suspend the new joint rate and require the two carriers to continue to ship grain in accordance with their prior separate practices. The only question raised was whether the water carrier which filed the joint rate had the burden of proving the rate reasonable, a burden which, under the enactment of 1910, was imposed only in respect of an "increased rate" (Mann-Elkins Act of 1910, ch. 309, § 12, 36 Stat. 552) but since 1940 has been imposed in respect of any "changed rate." 49 U.S.C. § 15(7) (Transportation Act of 1940, ch. 722, Title I, § 10(c), 54 Stat. 912). For purposes of burden of proof, the Commission held that the rate in question was not "changed" but "initial" (321 I.C.C. at 566), a category not referred to in section 15(7), which in Commission practice encompasses somewhat novel services offered by established carriers.[4] The Federal Power Commission, administering suspension provisions which are phrased in similar terms, has established by rule that it is without authority to suspend "initial rates" (18 C.F.R. §§ 2.4(d), 2.52 (1977)), and that Commission uses the term to mean original rates, such as those of a public utility or natural gas company commencing interstate operations under a certificate of public convenience and necessity, which do not "supersede, supplement, cancel or otherwise change" schedules previously on file. 18 C.F.R.

4. *See* Pet. 19-20 n. 21. *See also, e.g., Animal Feed from Mississippi and Tennessee to Midwest and Southwest,* 316 I.C.C. 94 (1962) (established motor carrier which had been transporting fertilizer filed "initial rates" for carriage of feed on same route); *Bituminous Coal via Motor-Rail from Lynnville, Ind., to Chicago, Ill.,* 313 I.C.C. 573 (1961) (established carriers filed joint rate for through transport of coal).

§ 35.1(b) (1977). *See Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, 146 (1960) ("when a producer commences interstate sales from a particular field . . . there are by definition no existing rates, and accordingly [the suspension provisions], which are bottomed on delaying the effectiveness of, and suspending, changes, are not relevant"). When Congress has focused its attention upon the question whether the suspension power might be used to block service by a new entrant in a regulated industry, it has provided that it could not be so used (Federal Aviation Act, § 1002, 49 U.S.C. § 1482(g) (1976)), except in cases where the agency otherwise has power to block the commencement of service by withholding a certificate of public necessity and convenience.[5] Prior to granting such a certificate the agency must of course review and approve the new entrant's original rates. *See Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959).

2. Congress Intended Suspension as a Tool to Maintain the Status Quo Pending Investigation.

In accordance with the purpose of Congress, the Interstate Commerce Commission has traditionally exercised the suspension power as "an emergency measure to preserve the *status quo* until determination can be had as to whether certain proposed acts are legal." *Vulcan Detinning Co.* v. *New York Central Railroad Co.,* 203 I.C.C. 260, 261 (1934). "[I]t is contemplated that the rates sought to be increased or otherwise changed are to be continued in

5. *Compare* 49 U.S.C. §§ 316(g) and 306(a)(1) (motor carriers); 907(g), (i) and 909(a) (water carriers); 1006(e) and 1010(a)(1) (freight forwarders); *see* Pet. 21 & n.20. The same rationale explains the recent decision of Congress to authorize suspension of original rates of carriers under the Federal Communications Act (*see* Alaska Br. 7), since the FCC already had power to block commencement of operations under that act by withholding a certificate of public convenience and necessity, 47 U.S.C. § 214 (1976).

effect. . . . th[illegible] status quo will be maintained. . . ." *Class Rates Between Stations in Louisiana,* 33 I.C.C. 302, 303 (1915). Since the shipper may obtain a refund if a new rate should prove excessive, and since the carrier has no recourse if his tariff should prove inadequate, a summary finding that a new rate might be excessive or otherwise suspect is not in itself sufficient to justify suspension. Suspension should be permitted only if the Commission also finds, on balance, that continuation of the status quo is preferable, in the public interest, to commencement of service at the new rate. Such a finding is implicit in a decision to require maintenance of service at an old rate. In the instant case, however, the Commission held that it was "contrary to the interests of all concerned" to postpone the commencement of service on the Trans-Alaska Pipeline. Pet. App. C-7. But the Commission suspended the tariffs anyway, on the assumption that it could thus coerce the carriers into filing different interim tariffs at rates fixed by itself.

The Alaskan respondents contend that the Commission had absolute, unreviewable power to suspend the tariff (Alaska Br. 8), but it could scarcely be contended that the Commission might offer as justification for a suspension that it had flipped a coin or based its decision on some other consideration inconsistent with the purpose of Congress. The decisions of the District of Columbia Circuit have recognized a distinction between *bona fide* suspensions, consistent with the purpose of Congress, and " 'sham' suspensions aimed at coercing behavior rather than merely preserving the status quo pending investigation." *Continental Airlines, Inc.* v. *Civil Aeronautics Board,* 522 F.2d 107, 129 (D.C. Cir. 1975); *Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970). The Court of Appeals for the Fifth Circuit erred in the instant case in disregarding that distinction.

3. Congress Sought to Ensure Procedural Fairness in Ratemaking.

Congress provided that the Interstate Commerce Commission should fix rates only after full hearing and upon a record which allowed judicial review. It thus sought to ensure that carriers would be allowed to operate either at rates fixed by themselves or at rates fixed by the Commission with due process of law. Respondents contend, however, that the Commission can achieve the effective result of fixing rates through exercise of the suspension power, without the prescribed hearing. Extending their claim that the Commission may suspend a rate for any reason, respondents contend that the Commission may also decree in advance what rates it shall suspend, without allowing the carrier to be heard in respect of the rate finally approved by the Commission. In respondents' view, the Commission actually does the carrier a favor if it fixes maximum rates in this manner, as it obviates the necessity for "ponderous" and "unnecessary" procedures. Fed. Br. 11-12; Alaska Br. 13-14. Respondents would disregard the fact that Congress devised the statutory plan in order to ensure compliance with due process. The rough and summary procedure for which respondents contend would impose loss upon new carriers without fair hearing and in a manner not contemplated by Congress.

CONCLUSION

In authorizing construction of the Trans-Alaska Pipeline, Congress implicitly promised that those who undertook that task would be allowed to earn a fair return on their investment, and that the amount of such return would be determined in accordance with fair and lawful procedures. The question whether that promise shall be honored is an important question which should be settled by this Court. It is a tenet of the popular wisdom that private investment is

often more efficient than government expenditure. If private investment is to retain a role in our mixed economy in the accomplishment of such projects, it is important that this Court reaffirm the procedures which Congress intended to safeguard such investment. Petitioner does not contend that it should be allowed to earn an unreasonably high return on its investment but that the rate of such return should be judged and determined upon a fair hearing, with due process of law, upon a record which allows judicial review.

Accordingly, for the reasons set forth above and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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